RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
MAR 17 2016
OFFICE OF THE CLERK

No. 15-457

In the
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A PLAINTIFF WHO DISMISSES WITH PREJUDICE LACKS ARTICLE III STANDING TO APPEAL A CLASS CERTIFICATION DENIAL 3

A. Denial of Class Certification Has No Bearing on the Merits or Plaintiff's Legal Ability to Proceed 4

B. A Purported Class Representative's Claims Rise and Fall with His Individual Claims 7

II. POLICY CONSIDERATIONS FAVOR EXTENSION OF *LIVESAY* TO DISMISSALS WITH PREJUDICE 10

A. Procedural Rules Should Not Encourage Litigation Gamesmanship 10

B. The Interests of Plaintiffs' Counsel Cannot Be Imputed to the Plaintiffs Themselves 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Airframe Systems, Inc. v. Raytheon Co.,
601 F.3d 9 (1st Cir. 2010) 13

Allen v. Bedolla,
787 F.3d 1218 (9th Cir. 2015) 16

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 17

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) 6

Anderson v. CNH U.S. Pension Plan,
515 F.3d 823 (8th Cir. 2008) 11

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 19

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 3

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 17

Bailey v. Patterson, 369 U.S. 31 (1962) 9

Baker v. Microsoft Corp.,
797 F.3d 607 (9th Cir. 2015) 2

Bennett v. Spear, 520 U.S. 154 (1997) 1

Bode & Grenier, LLP v. Knight,
808 F.3d 852 (D.C. Cir. 2015) 14

Bowles v. Russell, 551 U.S. 205 (2007) 10

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 12

TABLE OF AUTHORITIES—Continued

Page

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 9, 13

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 3, 7

Camreta v. Greene, 131 S. Ct. 2020 (2011) 3

Chapman v. Procter & Gamble Distributing, LLC,
766 F.3d 1296 (11th Cir. 2014) 13

Collins v. Miller,
252 U.S. 364 (1920) 10

Contractors Edge, Inc. v. City of Mankato,
863 N.W.2d 765 (Minn. 2015) 14

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 2-3, 6, 10-11, 17

Dannenberg v. Software Toolworks,
16 F.3d 1073 (9th Cir. 1994) 9

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 12-13

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 5, 7, 11

Dickinson v. Petroleum Conversion Corp.,
338 U.S. 507 (1950) 14

Empire Volkswagon, Inc. v.
World Wide Volkswagon Corp.,
814 F.2d 90 (2d Cir. 1987) 4-5

Espenscheid v. DirectSat USA, LLC,
688 F.3d 872 (7th Cir. 2012) 16

TABLE OF AUTHORITIES—Continued

Page

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009) 9

First American Financial Corp. v. Edwards,
132 S. Ct. 2536 (2012) 1

FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004) 13

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 4, 7

Gerstein v. Pugh, 420 U.S. 103 (1975) 8

Grupo Dataflux v. Atlas Global Grp., L.P.,
541 U.S. 567 (2004) 12

Hackett v. General Host Corp.,
455 F.2d 618 (3d Cir.),
cert. denied, 407 U.S. 925 (1972) 15

Hall v. State Farm Mut. Auto. Ins. Co.,
215 Fed. Appx. 423 (6th Cir. 2007) 15

Himler v. Comprehensive Care Corp.,
790 F. Supp. 114 (E.D. Va. 1992),
appeal dismissed,
993 F.2d 1537 (4th Cir. 1993) 7-8

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 3-4

In re Community Bank of Northern Virginia,
418 F.3d 277 (3d Cir. 2005) 15

Laczay v. Ross Adhesives,
855 F.2d 351 (6th Cir. 1988),
cert. denied, 489 U.S. 1014 (1989) 4

Laird v. Tatum, 408 U.S. 1 (1972) 4

TABLE OF AUTHORITIES—Continued

Page

Lewis v. Casey, 518 U.S. 343 (1996) 5

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 17

Local No. 438 Constr. and General Laborers' Union, AFL-CIO v. Curry,
371 U.S. 542 (1963) 4

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 1

Maguire v. Sandy Mac, Inc.,
145 F.R.D. 50 (D.N.J. 1992) 7

Massachusetts v. E.P.A., 549 U.S. 497 (2007) 1

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) 10

Muro v. Target Corp.,
580 F.3d 485 (7th Cir. 2009) 11

Newton v. Merrill Lynch,
259 F.3d 154 (3d Cir. 2001) 17

Pastor v. State Farm Mut. Auto. Ins. Co.,
487 F.3d 1042 (7th Cir. 2007) 7

Phillips v. Asset Acceptance, LLC,
736 F.3d 1076 (7th Cir. 2013) 16

Potter v. Norwest Mortgage, Inc.,
329 F.3d 608 (8th Cir. 2003) 8

Raceway Properties, Inc. v. Emprise Corp.,
613 F.2d 656 (6th Cir. 1980) 5

Raines v. Byrd, 521 U.S. 811 (1997) 2

TABLE OF AUTHORITIES—Continued

Page

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 8

Ruppert v. Principal Life Ins. Co.,
705 F.3d 839 (8th Cir. 2013) 7

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 9

Sears, Roebuck & Co. v. Butler,
134 S. Ct. 1277 (2014) 1

Sosna v. Iowa, 419 U.S. 393 (1975) 10

Spokeo v. Robins,
No. 13-3339 (U.S. filed May 1, 2014) 1

State Treasurer of State of Michigan v. Barry,
168 F.3d 8 (11th Cir. 1999) 11-12

Summers v. Earth Island Institute,
555 U.S. 488 (2009) 1

Toms v. Allied Bond & Collection Agency, Inc.,
179 F.3d 103 (4th Cir. 1999) 4

Tyrues v. Shinsecki,
732 F.3d 1351 (Fed. Cir. 2013) 14

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 7-9, 15

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 8

Van Cauwenberghe v. Biard,
486 U.S. 517 (1988) 11

TABLE OF AUTHORITIES—Continued

Page

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1, 5-6

White v. Baptist Mem'l Health Care Corp.,
699 F.3d 869 (6th Cir. 2012) 7

United States Constitution

U.S. Const. art. III 3, 8-9, 17, 19

U.S. Const. art. III, § 2 3

Rules of Court

Fed. R. Civ. P. 23 5-6

Fed. R. Civ. P. 23(a) 9

S. Ct. R. 37 1

S. Ct. R. 37.3(a) 1

S. Ct. R. 37.6 1

Miscellaneous

Barnette, William P.,
The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems,
56 S. Tex. L. Rev. 451 (2015) 5-6, 9-10, 17

Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573 15

TABLE OF AUTHORITIES—Continued

Page

Dixon, Lloyd & Gill, Brian, RAND Inst. for Civil Justice, *Changes in the Federal Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision* (2001) 12-13

Donaldson, Jr., David H., Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions*, 54 Tex. L. Rev. 1289 (1976) 15

Fisher, Daniel, *$7.8 Million Fee for Lawyers, 7-Cent Check for One Lucky Class Member*, FORBES, Jan. 8, 2016, http://www.forbes.com/sites/danielfisher/2016/01/08/7-8-million-fee-for-lawyers-7-cent-check-for-one-lucky-class-member/#246210ee6c61 16

Frank, Theodore D., *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292 (1966) 14

Hines, Laura J., *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027 (2010) 6

Nagareda, Richard A., *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149 (2003) 18

Redish, Martin H. & Kiernan, Megan B., *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 Iowa L. Rev. 1659 (2014) 16-17

TABLE OF AUTHORITIES—Continued

Page

Redish, Martin H., *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71 18

Schwartz, Joanna C., *Gateways and Pathways in Civil Procedure*, 60 UCLA L. Rev. 1652 (2013) 12

Skitol, Robert A., *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239 (1999) 18

Trask, Andrew J., *The Roberts Court and the End of the Entity Theory*, 48 Akron L. Rev. 831 (2015) 7

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Microsoft Corp.[1] PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates for limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, *see, e.g.*, *Spokeo v. Robins*, No. 13-3339 (U.S. filed May 1, 2014); *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as well as cases involving class actions in federal court. *See, e.g.*, *Sears, Roebuck & Co. v. Butler*, 134 S. Ct. 1277 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Washington-based plaintiffs sued in a purported class action alleging a design defect in Microsoft's manufacture of Xbox game consoles. The district court denied class certification and the plaintiffs filed an interlocutory appeal which, in its discretion, the Ninth Circuit denied. Rather than pursuing their individual claims, the plaintiffs voluntarily dismissed their claims with prejudice for the purpose of appealing the certification denial. *Baker v. Microsoft Corp.*, 797 F.3d 607, 609-11 (9th Cir. 2015).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466 (1978), this Court held that plaintiffs seeking review of interlocutory orders denying class certification typically must wait until after final judgment, even if the order sounds the "death knell" for the plaintiffs' claims. Since *Livesay*, five circuit courts of appeals have held that plaintiffs cannot evade *Livesay* by voluntarily dismissing their lawsuits with prejudice to force a final judgment that then becomes immediately appealable. In this case, the Ninth Circuit held to the contrary: that the plaintiffs' tactic of voluntary dismissal sufficed to create a final judgment such that the appellate court had jurisdiction to decide whether certification was properly denied or should have been granted. *Baker*, 797 F.3d at 615.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). The plaintiffs' voluntary dismissal resulted in no remaining "case or controversy" necessary for jurisdiction under

Article III of the U.S. Constitution. This Court should not countenance the tactical end-run around *Livesay*.

The decision below should be reversed.

ARGUMENT

I

A PLAINTIFF WHO DISMISSES WITH PREJUDICE LACKS ARTICLE III STANDING TO APPEAL A CLASS CERTIFICATION DENIAL

Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2. This constitutional boundary functions as an "essential limit on [judicial] power: It ensures that [courts] act *as judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). In so doing, the standing doctrine furthers the separation of powers defined by the Constitution. *Id.* at 2661.

A case or controversy exists when both the plaintiff and the defendant have a "personal stake" in the lawsuit. *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (citation omitted). This requirement extends through the course of the entire litigation; it is not a snapshot in time, relevant only when the complaint is filed. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). When "an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be

dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013).

Whether a plaintiff has standing is a matter that courts must determine objectively. If a court's assessment of constitutional standing defers to the plaintiff's subjective assessment of the value of his case, no case would ever be dismissed on such grounds. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'") (citation omitted); *Hollingsworth*, 133 S. Ct. at 2661. *Cf. Toms v. Allied Bond & Collection Agency, Inc.*, 179 F.3d 103, 107 (4th Cir. 1999) ("No party can create jurisdiction merely by agreement; the Constitution vests authority in the courts only where a concrete interest is present.").

A. Denial of Class Certification Has No Bearing on the Merits or Plaintiff's Legal Ability to Proceed

Article III requires that the only type of voluntary dismissal with prejudice that can be appealed is that which "effectively" dismisses a case. *See Laczay v. Ross Adhesives*, 855 F.2d 351, 354 (6th Cir. 1988) (citation omitted), *cert. denied*, 489 U.S. 1014 (1989); *Empire Volkswagon, Inc. v. World Wide Volkswagon Corp.*, 814 F.2d 90, 94 (2nd Cir. 1987). An order "effectively" dismisses a case when it affects the merits of the case or imposes a significant legal burden on the plaintiff's ability to proceed with the litigation. *See Local No. 438 Const. and General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 548-49 (1963) (courts may consider jurisdictional determination whether

state courts may review a controversy within the allegedly exclusive domain of the National Labor Relations Board, a matter wholly independent of the merits that is subject to no further review in the state courts); *Empire Volkswagon*, 814 F.2d at 94 (partial summary judgment dismissing most of plaintiff's claims); *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980) (district court's determination of relevant market for antitrust claim effectively disposed of the case because the plaintiffs could not proceed with evidence regarding the relevant market outlined by the district court).

By definition, a ruling denying class certification is procedural in nature and does not resolve the merits of the named plaintiff's individual claim. *See generally* Fed. R. Civ. P. 23 (discussing the procedural requirements for class certification); *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing . . . .") (citation and internal quotation marks omitted); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 336 (1980) ("We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment."); William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451, 477 (2015). Class certification decisions remain procedural in nature even though the analysis of whether a class should be certified will frequently "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The "necessity of touching aspects of the merits in order to resolve preliminary matters," such as

certification, does not mean that the merits are conclusively determined one way or the other by the resolution of the preliminary matters. *Id.* at 2552.

A court order denying class certification, therefore, has no effect on the merits of the plaintiff's claim, nor does it impose any constitutionally relevant legal impediment. *See Livesay*, 437 U.S. at 464-66 (A district court's order denying class certification is not "appealable as a matter of right," even if denial of class status sounds the "death knell" of the litigation because the named plaintiffs find it uneconomical to proceed on their individual claims.); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309-10 (2013) (Federal Rule of Civil Procedure 23 does not establish any entitlement to class proceedings for vindication of statutory rights, even when the costs of proceeding individually are "prohibitively high.") (citation omitted). The plaintiff's individual claims remain just as they were prior to filing a motion for certification.

Moreover, denial of class certification does not necessarily render it "economically imprudent" for individual plaintiffs to pursue their case further. Barnette, *supra*, at 478 (citing Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027, 1032 (2010)). The cost of litigation will not always lead an unsuccessful class representative to stop litigating. *See Livesay*, 437 U.S. at 470, 471 & n.15 ("the litigation will often survive an adverse class determination . . . [given the plaintiff's] prospect of prevailing on the merits and reversing an order denying class certification."). In cases where a successful plaintiff is entitled to recover fees, the

individual litigation may well be worth pursuing. And, for those truly small dollar cases, small claims court efficiently and inexpensively fits the bill. *See Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007); *Maguire v. Sandy Mac, Inc.*, 145 F.R.D. 50, 54 (D.N.J. 1992) (denying class certification while cautioning against "the transformation of the federal court system into a veritable small claims court").

B. A Purported Class Representative's Claims Rise and Fall with His Individual Claims

Prior to class certification, a purported class representative presents only his individual substantive claims. *Campbell-Ewald*, 136 S. Ct. at 667; Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 Akron L. Rev. 831, 860 (2015) ("[A] class action is nothing more than an individual lawsuit until the time that a court certifies it as a class action."). Courts have found a secondary interest in the existence of the purported class itself, but only when the named plaintiff's substantive claims are mooted involuntarily. *See Genesis Healthcare*, 133 S. Ct. at 1530; *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *Roper*, 445 U.S. at 330; *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 843 (8th Cir. 2013) (Ruppert's voluntary dismissal (relinquishment) of his individual claims renders the case moot, eliminating any party before the court with a sufficient personal stake in challenging the district court's denial of class certification.); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 878 (6th Cir. 2012) ("[A] lead plaintiff cannot be similarly situated and represent opt-in plaintiffs without a viable claim."); *Himler v. Comprehensive Care Corp.*, 790 F. Supp. 114, 116 (E.D.

Va. 1992), *appeal dismissed*, 993 F.2d 1537 (4th Cir. 1993) ("By employing this procedure to appeal the denial of their motion for class certification, plaintiffs are in effect attempting to sidestep the rule that interlocutory orders are not appealable as well as the rule that voluntary dismissals with prejudice by plaintiffs are not appealable.").

These holdings are consistent with the general rule that a party who voluntarily dismisses a claim with prejudice lacks both an injury and adversity within the meaning of Article III. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958). There is nothing unique about the role of an unsuccessful class representative that should change the application of the general rule. *See, e.g., Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) ("[W]hen a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements."); *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 611-13 (8th Cir. 2003) (courts should normally dismiss an action as moot when the named plaintiff settles its individual claim and the class has not been certified).[2]

---

[2] The normal rules regarding mootness also continue to apply. *Geraghty*, 445 U.S. at 399 ("inherently transitory" claims may continue beyond the mootness of the individually named plaintiff's claim); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975) (holding that the claims of the unnamed members of the class are not mooted by the termination of the class representative's claims when the case addressed inherently transitory challenges to probable cause procedures).

Within the meaning of Article III there is only the class representative's individual claim that she is seeking to prove on behalf of the class. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue . . . as representative parties on behalf of all members . . . ."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff must be part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents."); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam) ("[Plaintiffs] cannot represent a class of whom they are not a part."). When a plaintiff dismisses claims with prejudice, they "are gone forever—they are not reviewable by [an appellate c]ourt and may not be recaptured at the district court level." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013) (citing *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009)) (a litigant's voluntary dismissal of a portion of their claims in order to secure an appeal, extinguishes those dismissed claims forever); *Dannenberg v. Software Toolworks*, 16 F.3d 1073, 1077 (9th Cir. 1994) (a party may not revive claims dismissed for the purposes of establishing a final appealable order). That is, there is no amorphous "class" claim floating free of the named plaintiff's individual claim. Barnette, *supra*, at 480.[3] As such,

---

[3] Only once certified does a class acquire a limited legal status that may be separated from the interests of the named plaintiff, that allows the class to continue with a new representative should the original named plaintiff's claim be rendered moot. *See Geraghty*, 445 U.S. at 405, 407 (the question of who would represent the class on remand is different from whether the class claim was moot). However, "that separate legal status does not

(continued...)

the plaintiff has no standing remaining to appeal the results of interlocutory motions such as a denial of class certification.

II

POLICY CONSIDERATIONS FAVOR EXTENSION OF *LIVESAY* TO DISMISSALS WITH PREJUDICE

A. Procedural Rules Should Not Encourage Litigation Gamesmanship

The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered," and exceptions must "never be allowed to swallow" it. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). An appeal may not proceed "in fragments." *Collins v. Miller*, 252 U.S. 364, 370 (1920). In the appellate-jurisdiction context, the Court "has no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The final judgment rule

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial . . . . In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals

---

[3] (...continued)
somehow untether the substantive rights of the class members from the claim of the class representative." Barnette, *supra*, at 480 n.226 (citing *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

> from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Van Cauwenberghe v. Biard, 486 U.S. 517, 521 n.3 (1988) (citations and internal quotation marks omitted).

A plaintiff has no right to an interlocutory appeal of a denial of class certification even when the plaintiff perceives that denial to be the "death knell" of his lawsuit. *Livesay*, 437 U.S. 463. The policy reasons underlying that decision justify its broad application. Courts have refused to permit various attempts to avoid the final judgment rule with regard to class certification denials. For example, a plaintiff cannot use a settlement agreement as a springboard to appeal a class certification denial. *See Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 827 (8th Cir. 2008) (recitation in settlement agreement that plaintiff reserves right to appeal denial of class certification not sufficient to create concrete interest in class certification issue required by *Roper*, 445 U.S. 326); *Muro v. Target Corp.*, 580 F.3d 485, 491 (7th Cir. 2009) ("A voluntary settlement by the prospective class representative often means that, as a practical matter, the settling individual has elected to divorce himself from the litigation and no longer retains a community of interests with the prospective class."). In these cases, the plaintiff must proceed with his claims and appeal the denial of class certification once the court has entered final judgment on the merits.

"Policy matters, too, in sculpting the final judgment rule." *State Treasurer of State of Michigan v. Barry*, 168 F.3d 8, 19 (11th Cir. 1999) (Cox, J., concurring). For "operational consistency and

predictability in the overall application of § 1291," this Court should adopt a bright-line rule to determine whether jurisdiction exists or not when a purported class action representative dismisses his lawsuit with prejudice for the sole purpose of creating a "final judgment." *Id.* at 21 (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction," is "particularly undesirable.").

The plaintiff's proposed exception to the final judgment rule in this case violates all established policies favoring the final judgment and avoiding piecemeal litigation. He argues that the exception is necessary to prevent his abdication of the lawsuit as uneconomical to pursue. But the potential effects of a denial of class certification are not unique to that procedural aspect of a case. An analogous situation arises when a trial court refuses to allow a party's expert witness to testify, pursuant to its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (A court must ensure that the expert testimony at issue "both rests on a reliable foundation and is relevant to the task at hand."). Like class certification denials, the exclusion of a plaintiff's expert may cause the plaintiff to "narrow the case, drop the case altogether, or accept a reduced settlement" and may cause the defendant to move for summary judgment; while exclusion of a defendant's expert may cause the defendant to "accept certain allegations by plaintiffs" or settle. Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. Rev. 1652, 1664 n.40 (2013) (citing Lloyd Dixon & Brian Gill, RAND Inst. for Civil Justice, *Changes in the Federal Standards for Admitting Expert*

Evidence in Federal Civil Cases Since the Daubert Decision 55 (2001)). And yet plaintiffs may not circumvent the need for a final judgment to appeal. *See Chapman v. Procter & Gamble Distributing, LLC*, 766 F.3d 1296, 1302 (11th Cir. 2014) (dismissing appeal of *Daubert* order for lack of standing, after parties agreed to a joint dismissal with prejudice, including a provision purportedly reserving the right to appeal the *Daubert* ruling).

Courts routinely halt attempts to circumvent fundamental procedural rules. In *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d at 245, the Third Circuit held that voluntary dismissal of individual claims constituted an impermissible attempt to manufacture finality for purposes of appeal. The court spoke of the "procedural sleight-of-hand" in harsh terms: "Appellants have attempted to short-circuit the procedure for appealing an interlocutory district court order that is separate from, and unrelated to, the merits of their case." Allowing such a maneuver, the court continued, would leave no obstacle to "prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action. This would greatly undermine the policy against piecemeal litigation." *Id.* at 245-46. *See also Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010) (doctrine of claim preclusion "protect[s] litigants against gamesmanship and the added litigation costs of claim-splitting, and preventing scarce judicial resources from being squandered in unnecessary litigation"); *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004) (courts discourage strategic gamesmanship in litigation that hinders case development and imposes unnecessary costs).

"Strategic or merely lazy circumventions of a legal process grounded in a sound policy have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike." *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 861 (D.C. Cir. 2015) (citation omitted).

One ironic but inevitable by-product of the plaintiffs' proposed flexible approach to finality is that litigants face the undesirable risk that failure to appeal from a particular ruling at the time of its entry could constitute a waiver of the right to appeal at the conclusion of the case. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 516 (1950) (proposed intervenor "could have appealed" and the "failure to [do so] forfeits its right of review"). Lawyers unsure of the finality of the decision would appeal as a precautionary measure, even though the result is added costs and unwanted delay, disrupting the judicial process and undermining confidence in the trial court. Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292, 317 (1966). *Cf. Tyrues v. Shinsecki*, 732 F.3d 1351, 1358 (Fed. Cir. 2013) (a veteran must appeal decision of Board of Veterans' Appeals on a partial claim to avoid being barred by a rule requiring an appeal within 120 days of decision); *Contractors Edge, Inc. v. City of Mankato*, 863 N.W.2d 765, 775, 781 (Minn. 2015) (Lillehaug, J., dissenting) (a holding ostensibly to "discourage piecemeal appeals" by creating a "new, murky category of 'mostly final' judgments" will "encourage litigation over late appeals").

Moreover, if an individual plaintiff voluntarily dismisses his case with prejudice, for the purpose of appealing denial of class certification, is that plaintiff's

individual claim revived if the appellate court holds that the class should have been certified? *See, e.g.*, *Hall v. State Farm Mut. Auto. Ins. Co.*, 215 Fed. Appx. 423, 427 (6th Cir. 2007) ("[U]nnamed putative class members are not technically parties to an action prior to class certification and . . . as a consequence, [the substituted named plaintiff] was not a true party at the time that [the originally named plaintiff] filed suit."). If not, does class counsel have a right to substitute another named plaintiff of his or her choosing? *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 313 (3d Cir. 2005) ("[C]ourts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members."). *Geraghty*, 445 U.S. at 407 (Even if a case or controversy continues to exist after denial of class certification, the "question of who is to represent the class is a separate issue.") (citing David H. Donaldson, Jr., Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions*, 54 Tex. L. Rev. 1289, 1331-32 (1976)); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573, 602-08).

B. The Interests of Plaintiffs' Counsel Cannot Be Imputed to the Plaintiffs Themselves

The Third Circuit held in *Hackett v. General Host Corp.*, 455 F.2d 618, 625 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972):

> Realistically, when we are asked to grant interlocutory appellate review of an adverse class action determination we are asked to recognize a separate interest of the attorney

> sufficient to bring the class action determination within the "collateral order" doctrine, or to recognize the standing of the attorney's client to assert such an interest on his behalf. We decline to do either.

The lawyerly howls that greet the suggestion of a separate interest reveal one of the not-so-hidden truths about many class action cases: the instigators and most interested parties are not the consumers or employees or other individuals who suffered some small-dollar loss; the instigators and interested parties are the attorneys who seek to represent them for a significant cut of the settlement or eventual judgment.[4] *See Allen v. Bedolla*, 787 F.3d 1218, 1223-24 (9th Cir. 2015) (vacating settlement of uncertified class action and cautioning district court on remand to be wary of class counsels' self-interest and possible collusion); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1080 (7th Cir. 2013) ("[C]lass action attorneys are the real principals and the class representative/clients their agents . . . .") (internal quotation marks omitted); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876 (7th Cir. 2012) ("It is true that class actions are almost always the brainchild of lawyers who specialize in bringing such actions."); Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The*

---

[4] *See* Daniel Fisher, *$7.8 Million Fee for Lawyers, 7-Cent Check for One Lucky Class Member*, FORBES, Jan. 8, 2016, http://www.forbes.com/sites/danielfisher/2016/01/08/7-8-million-fee-for-lawyers-7-cent-check-for-one-lucky-class-member/#246210ee6c61 (multiple law firms representing class action against Bank of America settled for fees equal to a quarter of the $31 million the bank agreed to pay for improper flood insurance solicitations and shared commissions; class members received only 2.28% of the improperly paid insurance premiums).

Relitigation of Class Certification and the Realities of the Modern Class Action, 99 Iowa L. Rev. 1659, 1662 (2014) ("For all practical purposes, class attorneys function as far more than class members' legal representative: [Instead,] they act as quasi-guardians or trustees on behalf of the absent class members."). The fact that plaintiffs frequently abandon cases following the denial of certification likely says more about the putative class lawyer's fee,[5] rather than the individual plaintiff's potential recovery. Barnette, *supra*, at 478 n.216 (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) ("A class action . . . aggregate[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.")).

Few class actions actually proceed to judgment—the vast majority settle. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This Court and others acknowledge "the risk of 'in terrorem' settlements that class actions entail." *Id.* (citations omitted). For this reason, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. *See Livesay*, 437 U.S. at 476; *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under "hydraulic

---

[5] A mere interest in obtaining attorneys' fees without an underlying claim does not satisfy Article III. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).

pressure" to settle.). "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 151 (2003).

Such litigation is thus used not primarily to redress injury but as a mechanism to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Class members "neither make the decision to sue . . . nor receive meaningful compensation." *Id.* Rather, the prospect of significant attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.*

The plaintiffs' attorneys' interest in recovering fees cannot therefore be sufficient reason for creating a broad exception to the general rule that class certification denials may be appealed only when the courts exercise their discretion to permit it.

CONCLUSION

"In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). In this case, Article III's demands and policy considerations both lead to the same result.

The decision below should be reversed.

DATED: March, 2016.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation